

APPENDIX G: MARINE BOUNDARIES IN THE WESTERN PACIFIC REGION

(This appendix was prepared by the staff of the Western Pacific Regional Fishery Management Council.)

Introduction

This section reviews the complex issues surrounding marine boundaries in the Western Pacific Region. Delineation of current marine boundaries is discussed and specific areas of contention between various federal and state authorities are summarized.

Exclusive Economic Zone

The 1976 Fishery Conservation and Management Act (the Magnuson Act, and later, after amendments, the MSFCMA) established US jurisdiction from the seaward boundary of the territorial sea out to 200 miles for the purpose of managing fishery resources. Passage of the Magnuson Act was the first unilateral declaration of jurisdiction over a 200-mile zone by a major power. Presidential Proclamation 5030 of March 10, 1983, expanded Magnuson Act jurisdiction by establishing the US exclusive economic zone; it declared, “to the extent permitted by international law ... sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters” in the 200-mile zone. The assertion of jurisdiction over the EEZ of the United States provided a basis for economic exploration and exploitation, scientific research, and protection of the environment under the exclusive control of the US government. Congress confirmed presidential designation of the EEZ in 1986 amendments to the Magnuson Act. Under the Magnuson Act, fishery management authority in the EEZ off American Samoa, Guam, Hawaii, the Northern Mariana Islands, and other US islands in the central and western Pacific is the responsibility of the Western Pacific Regional Fishery Management Council.

The EEZ is measured from the “baseline” of US states and overseas territories and possessions out to 200 nautical miles. Under the Magnuson Act, the shoreward boundary of the EEZ is a line coterminous with the seaward boundary, baseline, of each “state.” (As used elsewhere in this document, US territories and possessions in the Western Pacific fall within the definition of state under the Magnuson Act (16 U.S.C. 1802, MSFCMA § 3 104-297)). In the case of the CNMI and the PRIAs, the EEZ extends to the shoreline (Beuttler 1995).

Seaward boundaries (territorial seas) for states are recognized as extending out to a distance of three miles from the ordinary low-water mark, as established by the Submerged Lands Act

(SLA) of 1953.¹ The Territorial Submerged Lands Act (TSLA) of 1960 was enacted to convey to the governments of American Samoa, Guam and Virgin Islands the submerged lands from the mean high-tide line out to three geographic miles from their coast lines (Beuttler 1995).

The CNMI was part of the United Nations Trust Territory of the Pacific Islands (administered by the US) until 1978 when its citizens chose to become a US commonwealth by plebiscite and agreed to by Congress. Although title of the emergent land was conveyed to the Commonwealth, the US government withheld title to the submerged lands of the archipelago.² Submerged lands and underlying resources adjacent to CNMI remain owned by the federal government and subject to its management authority (Beuttler 1995).

In the PRIAs, for which there are no sovereign entities similar to states or territories, various federal agencies have jurisdictional authority. Authority is often established through statutes, Executive Orders, and Presidential Proclamations, and marine boundaries are often unclear. For this reason, the extent to which an agency exercises its jurisdictional authority is subject to legal interpretation.

Territorial Seas

State of Hawaii

The State of Hawaii consists of all islands, together with their appurtenant reefs and territorial waters, which were included in the Territory of Hawaii under the Organic Act of 1900. Under the Admissions Act of 1959, Congress granted to Hawaii the status of statehood and all amenities of a state, which included the reversion of title and ownership of the lands beneath the navigable waters from the mean high-tide line seaward, out to a distance of three miles, as stated by the SLA of 1953. Congress excluded Palmyra Atoll, Kingman Reef, and Johnston Atoll, including Sand Island, from the definition of the State of Hawaii in 1959. The federal government also retained 1,765 acres of emergent land in the NWHI, which had been set aside by Executive Order 1019 in 1909, establishing the Hawaiian Islands Reservation (HIR). The HIR was later renamed the Hawaiian Islands National Wildlife Refuge (HINWR) after it was transferred from the Department of Agriculture to the Department of Interior in 1939 (Yamase 1982).

¹Under the SLA, the term “boundaries” or the term “lands beneath navigable waters” is interpreted as extending from the coastline to three geographical miles into the Atlantic Ocean or the Pacific Ocean, or three marine leagues (9 miles) into the Gulf of Mexico.

² The Territorial Submerged Lands Act was enacted for CNMI on October 5, 1974 (Beuttler 1995). Congress approved the mutually negotiated “Covenant to Establish a Commonwealth of the Northern Marianas (CNMI in political union with the US)”. However, the Covenant was not fully implemented until 1986, pursuant to Presidential Proclamation number 5564, which terminated the trusteeship agreement (Beuttler 1995).

Territories of Guam and American Samoa

Pursuant to the TSLA of 1960, the Territories of Guam and American Samoa own and have management responsibilities over the marine resources out to three “geographic” miles. In general, the authority of the MSFCMA begins at three nautical miles from the shoreline at Guam and American Samoa. There are, however, exceptions to the management authority in the Territories. For example, the federal government administers waters in National Wildlife Refuges and naval defense sea areas (NDSA)(see below).

US Fish and Wildlife Refuges and Units

The USFWS has been given authority to manage a number of NWRs in the Western Pacific Region. The USFWS asserts the authority to manage marine resources and activities, including fishing activities within Refuge boundaries pursuant to the National Wildlife Refuge System Administration Act (NWRSAA) of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, and other authorities (Gillman 2000). The USFWS asserts that NWRs are closed to all uses until they are specifically opened for such uses. They also claim that the USFWS is “solely” charged with making decisions whether to open NWRs for specific purposes that are compatible with the refuge’s primary purposes and mission (Smith 2000a).

Executive Order 1019 reserved and set apart Laysan and Lisianski Islands, and Maro and Pearl and Hermes Reefs, excluding Midway, “as a preserve and breeding ground for native birds” to be administered by the Department of Agriculture. The HIR was transferred to the DOI in 1939 and in 1940 renamed the HINWR through Presidential Proclamation 2466, with control transferred to the USFWS. Within the HINWR, the USFWS asserts management authority over coral reef resources to a depth of 10 fm around all islands with the exception of Necker Island, where it asserts a 20 fm boundary. The USFWS acknowledges that all HINWR islands are part of the State of Hawaii, but asserts that the islands are federally owned and administered as a NWR by the USFWS (Smith 2000b; USFWS (US Fish and Wildlife Service) 1999b).

Kure Atoll was initially included in Executive Order 1019 in 1909, which established the HIR. However, Kure Atoll was returned to the Territory of Hawaii in 1952 by Executive Order 10413 (Yamase 1982). Kure Atoll is the only State Wildlife Refuge in the NWHI and extends out three miles, to the State’s seaward boundary (Feder pers. com.).

In the PRIAs, the USFWS—based on interpretation of Executive Order 7358—asserts that its refuge boundaries extend to the extent of the NDSA, which was administered by the Department of Defense before the transfer of surplus land to the USFWS. The USFWS currently manages seven wildlife refuges in the PRIAs: Palmyra Atoll, Kingman Reef, Jarvis, Baker, and Howland Islands, and Johnston and Midway Atolls (Smith 2000b).

On January 18, 2001, the USFWS, through Secretarial Order 3223, declared Kingman Reef and the surrounding submerged lands and waters as a National Wildlife Refuge out to a distance of 12 nautical miles. Additionally, Secretarial Order 3224, issued the same day, declared the tidal

lands and submerged lands and waters of Palmyra Atoll as a National Wildlife Refuge out to a distance of 12 nautical miles.³

Midway Atoll NWR, established under Executive Order 13022 in 1996, is located in the NWHI and has a refuge boundary that is within a 22 by 22 mile quadrant surrounding the atoll (the exact boundary is disputed). The Navy established a Naval Air Facility at Midway in 1941. The USFWS established an overlay refuge in 1988 to manage the fish and wildlife on the Atoll. Through the Base Alignment Closure Act of 1990, as amended, the Naval Air Facility closed in 1993 and the property was transferred to the USFWS in 1996 (USFWS 1999a). The mission of the refuge is to protect and restore biological diversity and historic resources of Midway Atoll, while providing opportunities for compatible recreational activities, education and scientific research (Shallenberger 2000). Through a long-term cooperative agreement with a private company (Midway Phoenix Corp.), the refuge has been open to the public for marine recreation and education (Shallenberger 2000). This agreement was terminated as of January 2002.

Johnston Atoll NWR is managed cooperatively with the Navy. The atoll was first established as a federal bird refuge on June 29, 1926, through Presidential Executive Order 4467 to be administered by the Department of Agriculture. In 1934, through Executive Order 6935, the atoll was placed under the jurisdiction of the Navy for administrative purposes and has been used as a military installation since 1939. In 1941 Executive Order 8682 designated Johnston and other Pacific atolls NDSAs. In July 1, 1948, the US Navy, through an interagency transfer, gave operational control of Johnston Atoll to the US Air Force. Since 1976, the USFWS, under agreement with the military, assists in management of fish and wildlife resources on the atoll. The USFWS manages a recreational fishing program in the NWR (Smith 2000b).

Administration of Jarvis, Howland, and Baker Islands was transferred from the Office of Territorial Affairs to the USFWS in 1936 to be run as NWRs. The USFWS asserts refuge boundaries out to three nautical miles, and it prohibits fishing and any type of unauthorized entry (Smith 2000b). The USFWS acknowledges the Council's fishery management authority, in coordination with the NMFS, within the "200-nautical mile EEZ" (Smith 2000b).

Rose Atoll NWR, located in American Samoa, was established through a cooperative agreement between the Territory of American Samoa and the USFWS in 1973. Presidential Proclamation

³A September 15 2000, legal opinion by Randolph Moss, Assistant Attorney General, US Department of Justice, states that they are "unconvinced that the President has the authority to establish or expand a wildlife refuge within the U.S. territorial sea (12 miles) or the EEZ using presidential authority recognized in *Midwest Oil*." Because the National Wildlife Refuge System Administration Act does not itself contain a provision authorizing the President to withdraw land for a wildlife refuge, the DOI argues that the President could rely on the implied authority to reserve public lands recognized in *United States v. Midwest Oil Co.*, 236, U.S. 459 (1915). The Federal Land Policy and Management Act (FLPMA) of 1976 repealed the President's authority, effective on and after approval of the Act, to make withdrawals and reservations resulting from acquiescence of Congress (*U.S. v. Midwest Oil Co.*). Moss continued by stating that they find "it likely that a court would find that §704(a) of the FLPMA prohibits the President from relying on the implied *Midwest Oil* authority to withdraw lands, regardless of where those lands are located." Also, he notes that "they do not think history makes it clear that the President may continue to make *Midwest Oil* withdrawals in the territorial sea or EEZ following the enactment of the FLPMA."

4347 exempted Rose Atoll from a general conveyance of submerged lands around American Samoa to the Territorial Government. The boundary of the refuge extends out to three miles around the atoll and is under the joint jurisdiction of the Departments of Commerce and Interior, in cooperation of the Territory of American Samoa. Here too, the USFWS acknowledges fishery management authority of the Council, in coordination with the NMFS, within the “200-nautical mile EEZ” (Smith 2000b).

In the Ritidian Unit of the Guam National Wildlife Refuge, USFWS has fee title, which includes 371 acres of emergent land and 401 acres of submerged lands down to the 100-foot bathymetric contour. The submerged lands adjacent to Ritidian were never transferred to the Territory of Guam pursuant to the TSLA by the Federal government. In 1993, the USFWS acquired the emergent land of the Ritidian Unit and the surrounding submerged lands from the Navy at no cost (Smith 2000b).

Department of Defense Naval Defensive Sea Areas

A number of Executive Orders have given administrative authority over territories and possessions to the Army, Navy, or the Air Force for use as military airfields and for weapons testing. In particular, Executive Order 8682 of 1941 authorizes the Secretary of the Navy to control entry into NDSAs around Palmyra, Johnston, and Midway Atolls, Wake Island, and Kingman Reef. The NDSA includes “territorial waters between the extreme high-water marks and the three-mile marine boundaries surrounding” the areas noted above. The objectives of the NDSA are to control entry into naval defensive sea areas; to provide for the protection of military installations; and to protect the physical security of, and ensure the full effectiveness of, bases, stations, facilities, and other installations (32 CFR Part 761). In addition, the Airforce has joint administrative authority with the USFWS of Johnston Atoll and has recently transferred administrative authority over Kingman Reef to the USFWS. In 1996 Executive Order 13022 rescinded the Midway Atoll NDSA, and the Wake Island NDSA has also been suspended until further notice.

The Navy exerts jurisdiction over Farallon de Mendinilla in the CNMI and Ka‘ula Rock in the main Hawaiian Islands, which are used as military bombing ranges. The Navy also exerts jurisdiction over a variety of waters offshore from military ports and air bases in Hawaii, PRIAs, Guam, and the CNMI.

Issues

Claims between “state” and federal resource management agencies involving marine boundaries over individual islands, reefs and atolls, continue to be unresolved in the Western Pacific Region. Tables 1 and 2 summarize these various claims.

Northwestern Hawaiian Islands

The NWHI are primarily uninhabited atolls, islands, banks and shoals and are currently under

multi-agency jurisdiction including the State of Hawaii, the US Fish and Wildlife Service, the National Marine Fisheries Service and the Western Pacific Regional Fishery Management Council. Overlaps in jurisdiction and the varying regulatory authorities embodied in the management of this area can create numerous challenges and has led to contention regarding access and use for the region.

The State of Hawaii claims jurisdiction of all submerged lands from the shoreline to the extent of the State's jurisdiction in the NWHI. In accordance with the Hawaii Organic Act of April 30, 1900, c 339, 31 Stat 141 Section 2, and the Hawaii Admissions Act of March 18, 1959, Pub L 86-3, 73 Stat 4 Section 2, the Islands of the Hawaiian Archipelago, together with their appurtenant reefs and territorial waters, with the exception of Midway Atoll, are part of the territory of Hawaii and are managed by the State of Hawaii including all submerged lands and marine resources. The State of Hawaii, Department of Land and Natural Resources has stewardship responsibility for managing, administering and exercising control over the coastal and submerged lands, ocean waters and marine resources under State jurisdiction around each of the Northwestern Hawaiian Islands under Title 12, Chapter 171.3 Hawaii Revised Statutes. Under an Executive Order issued by President Truman, the emergent lands at Kure Atoll are also managed as a State Wildlife Refuge.

In addition to the State of Hawaii, the USFWS also claims jurisdiction over atolls, islands, banks and shoals in the NWHI. Following the Hawaii Admissions Act of March 18, 1959, federal agencies were directed to inventory all lands for which there was a continuing need. The USFWS in 1963, reported a continuing need of 1,765 acres of land in the NWHI. This area consisted of only the emergent land in the NWHI as was claimed by the Department of Agriculture as the original boundary of the Hawaiian Islands Refuge (Yamase 1982). More recently however, the USFWS claims that the HINWR includes 252,000 acres of submerged lands based on their interpretation of the terms "reef and inlets" contained in Executive Order 1019 (US Fish and Wildlife Service 1986). Within the HINWR, the USFWS asserts management authority over coral reef resources to a depth of 10 fathoms around all islands with the exception of Necker Island where it asserts a 20 fathom boundary. The USFWS acknowledges that all HINWR islands are part of the State of Hawaii, but asserts that the islands are federally owned and administered as a NWR by the USFWS (U.S. Fish and Wildlife Service 1999b, Smith 2000b). Other jurisdictional disputes also involve East and Tern Islands in French Frigate Shoals.^{4 5}

⁴In 1940, Territorial Governor Poindexter issued an Executive Order in concurrence with the President of the U.S. to set aside East Island for the use and purpose of the United States as a radar station communication base under the DOC (Yamase, 1982). Prior to statehood, the DOC returned East Island to the Territory of Hawaii (Yamase, 1982). However, the DOI contends that East Island was part of the HIR as established by Executive Order 1019 in 1909 and later transferred to the DOI in 1939. Therefore, East Island remains included in the HINWR and under authority of DOI.

⁵ Tern Island was expanded from 11 to 37 acres in 1942 by military dredging (Yamase 1982). In 1948, the Navy conveyed Tern Island to the Territory of Hawaii which then permitted the US Coast Guard in 1952 to establish a navigational Loran station (Yamase 1982). In 1979, USCG operations were terminated and the Hawaii State

Issues have developed from a series of directives from President Clinton that focused public attention on protection of US coral reef ecosystems. Executive Order 13089, Coral Reef Protection, issued in June 1998, requires agencies to (1) identify actions that may affect US coral reef ecosystems; (2) use their programs and authorities to protect and enhance the condition of such ecosystems; and (3) ensure that any actions they authorize, fund, or carry out will not degrade the conditions of coral reef ecosystems. Agencies whose actions affect US coral reef ecosystems must provide for implementation of measures needed to research, monitor, manage and restore affected ecosystems, including, but not limited to, measures reducing impacts from pollution, sedimentation, and fishing. The EO also established the US Coral Reef Task Force composed of the heads of 11 federal agencies and the Governors of the seven states, territories, or commonwealths with responsibilities for coral reefs. In March 2000, the Task Force issued the National Action Plan to Conserve Coral Reefs, which presents a cohesive national strategy to implement EO 13089.

In May 2000, the President issued a Memorandum stating that it is time to implement the Coral Reef Task Force's recommendations in order to comprehensively protect the coral reef ecosystem of the NWHI.⁶ The Memorandum directed the Secretaries of Interior and Commerce, in cooperation with the State of Hawaii, and in consultation with the WPRFMC, to develop recommendations for a new, coordinated management regime to increase protection for the NWHI coral reef ecosystem and provide for sustainable use. After considering their recommendations and comments received during the public visioning process on this initiative, President Clinton issued Executive Order 13178 on December 4, 2000, establishing the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, pursuant to the National Marine Sanctuaries Amendments Act of 2000 (NMSA). The EO was revised and finalized by Executive Order 13196, issued January 18, 2001. Pursuant to Executive Order 13178 and the NMSA, NOAA is initiating the process to designate the Reserve as a national marine sanctuary (66 FR 5509, January 19, 2001). These actions to protect the coral reef ecosystem of the NWHI and provide for sustainable use of the area underscore the immediate need for a comprehensive assessment of the impacts of fishing activity on this ecosystem.

Given the ongoing nature of the sanctuary designation process, this EIS does not address the outcome of that process or possible impacts of the proposed sanctuary on all components of the human environment. Preliminary potential impacts to the human environment are addressed in

Legislature adopted resolutions requesting the Governor to take immediate action to acquire and return Tern Island for use as a fishing base to support commercial activities (Yamase 1982). The Federal government asserts that it retains jurisdiction over Tern Island based on Executive Order 1019 and that the Navy did not have the authority to legally convey title to the Territory of Hawaii, therefore, the conveyance is void (Yamase 1982).

⁶ The President's directive coincided with Executive Order 13158, which requires federal agencies to establish a comprehensive national network of marine protected areas throughout US marine waters. The Executive Order calls for expansion of the nation's MPA system to include examples of all types of marine ecosystems. According to the executive order, a MPA means any area of the marine environment that has been reserved by federal, state, territorial, tribal, or local laws or has regulations to provide lasting protection for part or all of the natural and cultural resources therein.

the environmental consequences section of the EIS. However, two alternatives considered by this EIS (3 and 4, described in Chapter 2) are consistent with the concept of establishing marine reserves in the NWHI, as described in the CRE FMP.

The USFWS and the Council have different opinions about primary fishery management responsibilities in EEZ waters within NWR boundaries. Since the late 1960s, citing USFWS interim administrative policy and interpretation of Executive Order 1019, the USFWS has asserted that they would enforce refuge regulations within the “de facto” boundaries of the HINWR, which include all emergent land and their surrounding waters out to a depth of 10 fm for all islands and later 20 fm around Necker Island (Smith 2000b). Under the authority of the MSFCMA, the Council promulgated crustacean fishery regulations that correspond with USFWS refuge boundaries of 0-10 fathoms within NWHI federal waters, except at Necker where refuge boundaries extend to 20 fm (WPRFMC 1986). The Council recognizes state waters in the NWHI from 0-3 miles and asserts management authority over fishery resources in all federal waters (3-200 miles), except at Midway where it asserts authority from 0-200 miles (Gillman 2000).

Main Hawaiian Islands

The State of Hawaii claims jurisdiction beyond its territorial seas of 0-3 nautical miles by claiming archipelagic status over channel waters between the main Hawaiian islands (MacDonald and Mitsuyasu, 2000). The Federal Government does not recognize the State’s claim of archipelagic jurisdiction, but interprets the State’s seaward authority to stop at 3 nautical miles from the baseline (Feder 1997, MacDonald and Mitsuyasu 2000). The authority of the Magnuson Act therefore, begins at 3 miles from the shoreline around all main Hawaiian islands in the State of Hawaii. However the State of Hawaii does not agree with this interpretation.

American Samoa

The legal relationship between the Territory of American and the US with regard to fisheries management is unresolved due to a discrepancy in the wording of the deeds of cession signed by the chiefs of what is now American Samoa and the law enacted by Congress which extended US sovereignty over the eastern Samoa islands in 1900. Language contained in the deeds of cession signed by the chiefs of Tutuila district state that they ceded, transferred and yielded up “all these islands of Tutuila and Aunu‘u and all other islands, rocks, reefs, foreshores and waters lying between the 13th degree and the 15th degree of south latitude and between the 171st degree and 167th degree of west longitude....” Likewise, the chiefs of the Manu‘a Islands also ceded to the US “the whole of eastern portion of the Samoan Islands lying east of 171 degrees west of Greenwich and known as Tau, Olosega, Ofu and Rose Islands, and all other, the waters and property adjacent thereto....”

In contrast, Title 48 United States Code, Section 661, by which Congress accepted, confirmed and ratified these cessions by the chiefs, refers only to the islands, and not to the reefs, foreshores and waters or property adjacent lying between the referenced coordinates. Whether

Congress deliberately or unintentionally failed to extend sovereignty over reef and ocean waters transferred by the chiefs of Tutuila and Manu'a is uncertain. However, many American Samoans assert that management over the waters and submerged lands surrounding these islands, including submerged lands within the EEZ should remain with the territorial government.

A central premise for ceding eastern Samoa to the U.S. was to preserve the rights and property of the islands' inhabitants. Additionally, American Samoa's constitution makes it government policy to protect persons of Samoan ancestry from the alienation of their lands and the destruction of the Samoan way of life and language and to encourage business enterprise among persons of Samoan ancestry. Therefore, any federal actions within the EEZ waters of American Samoa that would stymie these rights, including restriction of fishing, may be perceived to be contrary to American Samoa's constitution.

CNMI

Currently, the EEZ includes all waters surrounding CNMI from shore out to 200 miles. However, through the legal system CNMI is pursuing a claim that the Commonwealth is vested authority out to 12 miles from the archipelagic baseline. The Council, for the purposes of fisheries management, defers management in waters 0-3 nmi to the CNMI while managing fishery resources 3-200 nmi.

Guam

The Territory of Guam questions the legality of the transference of the Ritidian Unit from the Navy to the USFWS. In its property inventory to the General Services Administration, the Navy listed the Ritidian Unit as excess lands, not of continual need and available for reversion to the Territory. The area represents ancestral lands of Chamorro families. Therefore, the Territory asserts that the fee title should not have been transferred to the USFWS (Guthertz pers. comm.).

In 1976, the Federal Fishery Conservation Zone (later known as the EEZ) was extended to 200 nmi around Guam which gave the federal government authority to manage marine resources within the EEZ. In 1980, the Guam Legislature passed and the Governor signed legislation providing for a 200 mile territorial limit for Guam (DOI 1993). The purpose of this legislation, was to allow the government of Guam to sell foreign fishing rights within Guam's EEZ. In 1996, the Magnuson-Stevens Act authorized the Secretary of State to negotiate foreign fishing agreements for fishing within the EEZ at the request of the Governor of Guam. However, in addition to the "state" waters around Guam, the government has also expressed a continuing interest in obtaining greater authority in managing the EEZ surrounding Guam.

PRIAs

In the PRIAs, primary jurisdiction over nearshore fisheries is an ongoing issue between the Department of the Interior and the Department of Commerce. Management authority is currently unresolved because no clear baseline boundary has been designated from which the

seaward boundaries of the PRIAs are measured. Seaward boundaries are not clearly defined because some islands in the PRIAs do not appear to have a seaward boundary as defined by US law (i.e., MSFCMA) (Beuttler 1995). For this reason, jurisdictional boundaries have been claimed by federal agencies in terms of fathoms, miles, or the territorial sea. Furthermore, it is recognized that various Executive Orders have given administrative authority of the PRIAs to either the DOD or DOI. However, Executive Orders themselves do not convey title of submerged lands, unless specifically stated. In any case, based on tentative interpretation by the NOAA legal counsel, MSFCMA authority applies to all marine waters around federally owned possessions (i.e., PRIAs), including marine resources within bays, inlets, and other marine waters to the shoreline (Beuttler 1995).

Additionally, because the NWRSA does not explicitly authorize the President to withdraw land for a wildlife refuge, the DOI argues that the President could rely on the implied authority to reserve public lands recognized in *United States v. Midwest Oil Co.* 236, U.S. 459 (1915). However, since the Federal Land and Policy Act of 1976 repealed the President's authority, effective on and after approval of the Act, to make withdrawals and reservations resulting from the acquiescence of Congress (*U.S. v. Midwest Oil Co.*), it appears that since 1976 the President has not had the authority to establish or expand a wildlife refuge within the US territorial sea (12 miles) or the EEZ using presidential authority recognized in *Midwest Oil* (Moss 2000). This could call into question asserted marine boundaries of any NWRs established after enactment of the FLPMA.

References

- Beuttler, T.M. 1995. Draft Memorandum from Theodore M. Beuttler to Martin Hochman, NOAA Southwest Region Regional Counsel. August 8, 1995.
- DOI (Department of the Interior), Office of the Solicitor. 1993. The Application of Federal Laws in American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin islands. Volume 3, U.S. Code Titles 40-50.
- Feder, J.J. 1997. Memorandum from Judson Feder, NOAA General Counsel, Southwest Region to Kitty Simonds, Executive Director of the Western Pacific Regional Fishery Management Council. October 17, 1997.
- Gillman, E. 2000. Existing marine resources management framework and recent initiatives to change the governance of marine resources of the Northwestern Hawaiian Islands. August 2000.
- Guthertz, J. Pers. Comm. June 14, 2000.
- MacDonald, C.D., and Mitsuyasu C.A. 2000. Regulatory setting for very large floating platforms in Hawaii. *Ocean and Coastal Management* 43: 65-85.

- Moss, D. R. 2000. Legal Opinion regarding the Administration of Coral Reef Resources in the Northwest Hawaiian Island. U.S. Department of Justice, Office of Legal Counsel. September 15, 2000.
- Shallenberger, R. 2000. Statement of Rob Shallenberger, Midway Wildlife Refuge Manager, USFWS Pacific Island Eco-Region, to the Western Pacific Regional Fishery Management Council at the 105th Council Meeting at Midway. July 10, 2000.
- Smith, R.P. 2000a. Memorandum from Robert Smith, Manager, USFWS Pacific Island Eco-Region, to Penelope Dalton, Assistant Administrator, NMFS. August 29, 2000.
- Smith, R.P. 2000b. Statement of Robert Smith, Manager, USFWS Pacific Island Eco-Region, to the Western Pacific Regional Fishery Management Council at the 104th Council Meeting at Makena, HI, June 14, 2000.
- U.S. Fish and Wildlife Service. 1986. Hawaiian Islands National Wildlife Refuge Master Plan/Environmental Impact Statement. Department of Interior. Region One.
- U.S. Fish and Wildlife Service. 1999a. Midway Atoll National Wildlife Refuge Historic Preservation Plan. Department of Interior.
- U.S. Fish and Wildlife Service. 1999b. Pacific Island National Wildlife Refuges: Hawaiian Islands National Wildlife Refuge. Pacific Islands Ecoregion, Honolulu, HI, USA.
- Western Pacific Regional Fishery Management Council. 1986. Fishery Management Plan for Lobster Fisheries of the Western Pacific Region, Amendment 4. October 31, 1986.
- Yamase, D. 1982. State-Federal Jurisdiction Conflict Over Submerged Lands in the Northwestern Hawaiian Islands. *University of Hawaii Law Review* 4(1): 139-180.

Table 1: Marine boundary claims by various jurisdictions in the Western Pacific Region.

	State/Territory	DOC (WPRFMC)	Other Authorities	Established in CRE FMP	
				No-take MPA	Low-use MPA
PRIAs					
Howland I.		0-200 nm	FWS: 0-3 nm	0-50 fm	
Baker I.		0-200 nm	FWS: 0-3 nm	0-50 fm	
Jarvis I.		0-200 nm	FWS: 0-3 nm	0-50 fm	
Johnston I.		0-200 nm	FWS/Air Force: 0-3 nm		0-50 fm*
Kingman R.		0-200 nm	FWS: 0-12 nm ¹	0-50 fm	
Palmyra A.		0-200 nm	FWS: 0-12 nm ²		0-50 fm*
Wake I.***		0-200 nm	Air Force: 0-3 nm		0-50 fm*
Midway A.		0-200 nm	FWS: 22x22 nm quad	0-50 fm*	0-50 fm*
				Disapproved in CRE FMP	
Hawaii					
MHI	Hawaii: 0-3 nm	3-200 nm			
Nihoa I.	Hawaii: 0-3 nm	3-200 nm	FWS: 0-10 fm**	0-10 fm	10-50 fm
Necker I.	Hawaii: 0-3 nm	3-200 nm	FWS: 0-20 fm**	0-10 fm	10-50 fm

¹ Boundary formerly 0-3 miles under the jurisdiction of the US Navy. Secretarial Order 3224 extended Department of the Interior's jurisdiction to 12 nmi.

² Secretarial Order 3223 (Palmyra Atoll) extended USFWS administrative authority to 3 to 12 nm.

*At Palmyra, Johnston, and Midway special permit fishing is only for recreational and on-island consumption; at Midway, the north half of the atoll would be a no-take MPA and the south half a low-use MPA.

**USFWS boundary begins at the shoreline; legally defined outer boundary of the Hawaiian Islands NWR is unresolved.

***Since 1962, the jurisdiction over Wake Island has resided in the Department of the Interior. Since 1994, the Department of the Army has maintained administrative control of Wake Island.

Table 1 (cont.)

	State/Territory	DOC (WPRFMC)	Other Authorities	Disapproved in CRE FMP	
				No-take MPA	Low-use MPA
FFS	Hawaii: 0-3 nm	3-200 nm	FWS: 0-10 fm**	0-50 fm	
Gardner Pinnacles	Hawaii: 0-3 nm	3-200 nm	FWS: 0-10 fm**	0-10 fm	10-50 fm
Maro R.	Hawaii: 0-3 nm	3-200 nm	FWS: 0-10 fm**	0-10 fm	10-50 fm
Laysan I.	Hawaii: 0-3 nm	3-200 nm	FWS: 0-10 fm**	0-50 fm	
Lisianski I.	Hawaii: 0-3 nm	3-200 nm	FWS: 0-10 fm**	0-10 fm	10-50 fm
Pearl and Hermes R.	Hawaii: 0-3 nm	3-200 nm	FWS: 0-10 fm**	0-10 fm	10-50 fm
Kure A.	Hawaii: 0-3 nm	3-200 nm		0-10 fm	10-50 fm
Established in CRE FMP					
Guam	Guam: 0-3 nm				
Ritadan Unit		0-200 nm	FWS: 100 ft. isobath		
CNMI	CNMI: 0-3 nm***	3-200 nm			
American Samoa	Am. Samoa: 0-3 nm	3-200 nm			
Rose Atoll		0-200 nm	FWS: 0-3 nm ³	0-50 fm	

³ At Rose Atoll, the Department of the Interior/US Fish and Wildlife Service has co-management agreement with the Territory of American Samoa and shares jurisdiction with the Department of Commerce.

**USFWS boundary begins at the shoreline; legally defined outer boundary of the Hawaiian Islands NWR is unresolved.

***The CRE FMP proposes to defer management in 0-3 nm to the CNMI while managing fisheries 3-200 nm.

Table 2 : Comparison of No-take and Low-use Marine Protected Areas of the Coral Reef Ecosystem FMP with the NWHI Reserve Preservation Areas (RPAs), US Fish and Wildlife Service and State/Commonwealth/Territory

ISLAND OR AREA	CRE FMP	NWHI RESERVE	USFWS	State/Territory/Commonwealth
Pacific Remote Island Areas				
Howland Island	No-take zone 0-50 fathoms.	–	Howland Island NWR to 3 nm; No fishing allowed.	–
Baker Island	No-take zone 0-50 fathoms.	–	Baker Island NWR to 3 nm; No fishing allowed.	–
Jarvis Island	No-take zone 0-50 fathoms.	–	Jarvis Island NWR to 3 nm; No fishing allowed.	–
Johnston Atoll	Low-use special permit zone 0-50 fathoms.	–	Johnston Atoll NWR/Air Force (Overlay Refuge) to 3 nm; Recreational fishing program..	–
Kingman Reef	No-take zone 0-50 fathoms.	–	Kingman Reef NWR to 12 nm; No fishing allowed.	–
Palmyra Atoll	Low-use special permit zone 0-50 fathoms.	–	Palmyra Atoll NWR to 12 nm; Recreational fishing proposed.	–
Wake Atoll	Low-use special permit zone 0-50 fathoms.	–	Air Force to 3 nm; Fishing allowed.	–
Midway Atoll	No-take zone 0-50 fathoms around north half of Midway. Low-use special permit zone around southern half of Midway (recommended by Council, but disapproved by NMFS in 2002).	–	Midway Atoll NWR between 28°5' and 28°25'; 177°10' and 177°30'; following fishing allowed within Refuge boundaries: 1 lobster/person/day; pelagic rec and charter fishing allowed; no bottomfishing.	–
Hawaiian Islands				
Main Hawaiian Islands	Special permits for “potentially harvested” species.	–	–	State of Hawaii bottomfish area closures (20 closures across MHI); 10 Marine Life Conservation Districts and 14 Marine Fishery Management Areas in MHI (rules and regulations vary with location).

ISLAND OR AREA	CRE FMP	NWHI RESERVE	USFWS	State/Territory/Commonwealth
Nihoa	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms around Nihoa and nearby banks (recommended by Council, but disapproved by NMFS in 2002).	RPA extends from the seaward boundary of Hawaii State waters (3nm) out to a mean depth of 100 fathoms. Bottomfish and recreational trolling for pelagics permitted seaward of 25 fathoms.	HINWR to 10 fathoms. No fishing allowed.	State of Hawaii proposed NWHI Marine Fisheries Management Area (NWHI FMA).
Misc. banks around Nihoa and Necker (8).	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	—	HINWR to 10 fathoms. No fishing allowed.	—
Necker	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	RPA extends from the seaward boundary of Hawaii State waters (3nm) out to a mean depth of 100 fathoms. Bottomfish and recreational trolling for pelagics permitted seaward of 25 fathoms.	HINWR to 20 fathoms. No fishing allowed.	State of Hawaii proposed NWHI Marine Fisheries Management Area (NWHI FMA).
Unnamed bank east of French Frigate Shoals	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	RPA to 12 nm from geographic center. No fishing allowed.	HINWR to 10 fathoms. No fishing allowed.	—
French Frigate Shoals	No-take zone 0-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	RPA extends from the seaward boundary of Hawaii State waters (3nm) out to a mean depth of 100 fathoms. No fishing allowed.	HINWR to 10 fathoms. No fishing allowed.	State of Hawaii proposed NWHI Marine Fisheries Management Area (NWHI FMA).

ISLAND OR AREA	CRE FMP	NWHI RESERVE	USFWS	State/Territory/Commonwealth
Brooks Banks (2)	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms around three banks southeast of St. Rogatien including two Brooks Banks and one bank NW of St. Rogatien (recommended by Council, but disapproved by NMFS in 2002).	RPA to 12 nm from geographic center of southeast Brooks Bank, but not closer than 3 nm to the next bank west (northwest Brooks Bank?). No fishing allowed.	HINWR to 10 fathoms. No fishing allowed.	—
St. Rogatien Bank	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	RPA to 12 nm from geographic center, but not closer than 3 nm to the next bank east. Bottomfish and recreational trolling for pelagics permitted.	HINWR to 10 fathoms. No fishing allowed.	—
Unnamed bank between Gardner Pinnacles and St. Rogatien Bank	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	RPA to 12 nm from geographic center. Bottomfish and recreational trolling for pelagics allowed for 5 years from order.	HINWR to 10 fathoms. No fishing allowed.	—
Gardner Pinnacles	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	RPA extends from the seaward boundary of Hawaii State waters (3nm) out to a mean depth of 100 fathoms. Bottomfish and recreational trolling for pelagics permitted seaward of 25 fathoms.	HINWR to 10 fathoms. No fishing allowed.	State of Hawaii proposed NWHI Marine Fisheries Management Area (NWHI FMA).

ISLAND OR AREA	CRE FMP	NWHI RESERVE	USFWS	State/Territory/Commonwealth
Raita Bank	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	RPA to 12 nm from geographic center. Bottomfish and recreational trolling for pelagics allowed for 5 years from order.	HINWR to 10 fathoms. No fishing allowed.	—
Maro Reef	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	RPA extends from the seaward boundary of Hawaii State waters (3nm) out to a mean depth of 100 fathoms. Bottomfish and recreational trolling for pelagics permitted seaward of 25 fathoms.	HINWR to 10 fathoms. No fishing allowed.	State of Hawaii proposed NWHI Marine Fisheries Management Area (NWHI FMA).
Laysan	No-take zone 0-50 fathoms (recommended by Council, but disapproved by NMFS in 2002). (Crustaceans FMP: Lobster fishing prohibited to 20 nm from geographic center).	RPA extends from the seaward boundary of Hawaii State waters (3nm) out to a mean depth of 100 fathoms. Bottomfish and recreational trolling for pelagics permitted seaward of 50 fathoms.	HINWR to 10 fathoms. No fishing allowed.	State of Hawaii proposed NWHI Marine Fisheries Management Area (NWHI FMA).
Misc banks near (SW of) Laysan (4).	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	—	HINWR to 10 fathoms. No fishing allowed.	—

ISLAND OR AREA	CRE FMP	NWHI RESERVE	USFWS	State/Territory/Commonwealth
Pioneer Bank	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	Preservation Area to 12 nm from geographic center. Bottomfish and recreational trolling for pelagics permitted.	HINWR to 10 fathoms. No fishing allowed.	—
Lisianski	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	RPA extends from the seaward boundary of Hawaii State waters (3nm) out to a mean depth of 100 fathoms. Bottomfish and recreational trolling for pelagics permitted seaward of 25 fathoms.	HINWR to 10 fathoms. No fishing allowed.	State of Hawaii proposed NWHI Marine Fisheries Management Area (NWHI FMA).
Misc banks near (W of) Lisianski (2).	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	—	HINWR to 10 fathoms. No fishing allowed.	—
Pearl and Hermes	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	RPA extends from the seaward boundary of Hawaii State waters (3nm) out to a mean depth of 100 fathoms. No fishing allowed.	Hawaiian Islands NWR (HINWR) to 10 fathoms. No fishing allowed.	State of Hawaii proposed NWHI Marine Fisheries Management Area (NWHI FMA).
Misc. banks in the vicinity of Kure, Midway and Pearl and Hermes (4).	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	—	HINWR to 10 fathoms. No fishing allowed.	—

ISLAND OR AREA	CRE FMP	NWHI RESERVE	USFWS	State/Territory/Commonwealth
Kure	No-take MPA in federal waters shallower than 10 fathoms. Low-use special permit zone 10-50 fathoms (recommended by Council, but disapproved by NMFS in 2002).	RPA extends from the seaward boundary of Hawaii State waters (3nm) out to a mean depth of 100 fathoms. No fishing allowed.	—	State of Hawaii Wildlife Refuge shoreline to 3 nm. Fishing not prohibited.
American Samoa and Guam				
Rose Atoll	No-take zone 0-50 fathoms.	—	Rose Atoll NWR to 3 nm; no fishing allowed.	A.S co-management agreement with DOI and shared jurisdiction with DOC.
Ritidian Unit of the Guam NWR	—	—	Ritidian Unit to 100 foot contour. Recreational fishing allowed.	—